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In The

Supreme Court of the United States

NATIONAL WINE AND SPIRITS, INC.,
NWS MICHIGAN, INC.,
and NATIONAL WINE & SPIRITS, L.L.C.,

Petitioners,

v.

STATE OF MICHIGAN and
MICHIGAN BEER & WINE WHOLESALER ASSOC.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Michigan

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

CONCLUSIONS 11

TABLE OF AUTHORITIES

Page

CASES

C & A Carbone Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 9

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 8, 9

Granholm v. Heald, 544 U.S. 460 (2005). ..... *passim*

Guinn v. United States, 238 U.S. 347 (1915) 10

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 4

National Paint & Coatings Assoc. v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995), cert. denied, 515 U.S. 1143 (1995) 9

North Dakota v. United States, 495 U.S. 423 (1990) 6, 7

Piazza's Seafood World v. Odom, 448 F.3d 744 (5th Cir. 2006) 9

Ward v. Maryland, 12 Wall. 418 (1871) 5

STATUTORY PROVISIONS

Mich. Comp. Laws § 436.1205 ..... 2, 3, 5

Mich. Comp. Laws § 436.1601 ..... 2, 3

REPLY BRIEF FOR THE PETITIONER

The parties are in agreement that Michigan forbids non-Michigan residents from holding wine wholesaler licenses. Yet, nowhere in respondents' briefs in opposition do they attempt to assert any legitimate state interest in this discrimination against out-of-state companies. Nor do they address petitioners' claim that the appropriate resolution of this case is a GVR in light of *Granholm v. Heald*, 544 U.S. 460 (2005). Instead, respondents seek to muddy the water by asserting various claims about how petitioners have litigated this case and about the actions petitioners have taken in response to the statute's discrimination against out-of-state residents. Respondents also seek to rely upon passages from this Court's opinions that bear no relevance to the issues at hand. None of the claims that respondents have advanced advise against this Court granting this petition for certiorari, vacating the decision of the Michigan Court of Appeals, and remanding for reconsideration in light of *Granholm* (or, in the alternative, simply granting certiorari in this case).

1. Throughout this litigation, petitioners have based their claims on the injuries they have suffered because Michigan does not allow out-of-state residents to hold wine wholesaler licenses (and did not allow that in 1996 – when the rights at issue were frozen in place). Petitioners have challenged that portion of Michigan's liquor statute that allows some Authorized Distribution Agents ("ADAs") to compete robustly within the wholesale wine market

but forbids other ADAs from doing the same. There is no dispute that the only ADAs who can enjoy this benefit are ADAs who were in-state residents as of 1996 – and were therefore able to hold wholesale wine licenses at that time, resulting in a protected wine market of approximately 20,000 brands. No out-of-state residents are included in that class because a Michigan statute (then and now) explicitly precludes out-of-state residents from securing wholesale wine licenses at all. This is the very sort of discrimination against out-of-state interests that the Court condemned in *Granholm*.

Respondents misunderstand the nature of this claim when they assert that petitioners did not challenge a statute forbidding out-of-state companies from acquiring wine wholesaler licenses. See State's BIO 11; Michigan Beer and Wine Wholesalers Association ("MBWWA") BIO 12, 18. A key element of petitioners' Commerce Clause challenge is – and always has been – that the vice of the ADA statute (Mich. Comp. Laws § 436.1205) is that it explicitly incorporates the wine-wholesaling statute's (Mich. Comp. Laws § 436.1601) unconstitutional discrimination against out-of-state residents.

Respondent MBWWA cites to a comment in Justice Markman's opinion stating that petitioners have not properly challenged the residency requirement statute. See MBWWA BIO 18. All that matters here, however, is that petitioners undeniably challenged the statute affecting them that incorporates this discrimination against out-of-state residents.

Here is what petitioners wrote about this issue, in a section of their brief entitled "Section 205(3) Discriminates on its Face":

> As a matter of law under § 601 * * * every wine wholesaler had to be a Michigan resident for a year prior to obtaining its wine wholesalers' license. Because the various provisions of the 1998 Code must be read and construed as one law, the requirement in § 601 that a wine wholesaler be a Michigan company must be incorporated into the language of § 205(3) just as if it had been written there. * * * Had § 205(3) expressly limited the right to dual to "Michigan" companies, there would be no question that it violated the Commerce Clause. The fact that the limitation is written in § 601 of the 1998 Code is of no moment for this Commerce Clause analysis.

Appellant's Brief on Appeal to the Michigan Supreme Court at 17-18. This case has always been about § 436.1205's incorporation of § 436.1601 and squarely challenges the residency requirement as applied to petitioners, in the context of the injury they continue to sustain as a result of the enforcement of § 436.1205.

2. As a practical matter, Michigan's discriminatory scheme has forced petitioners to take several actions in order to viably compete with other ADAs who, as in-state residents as of 1996, are not burdened by the statute's treatment of out-of-state residents. First, in 1999, petitioners created a Michigan entity that qualifies as an in-state resident. This post-1996 development has no impact, of course, on

petitioners' rights to "dual" under the ADA statute, which focuses on whether petitioners were in-state residents and were licensed as of 1996. Nonetheless, according to respondents, petitioners' ability to qualify as an in-state resident in 1999 demonstrates the absence of discrimination against out-of-state companies because any out-of-state entity, including NWS, could have done this before 1996 as well. See State's BIO 9, 12; MBWWA BIO 13, 17.

This argument renders the Commerce Clause's anti-discrimination requirement a nullity. It is *always true* that an out-of-state company could move in-state and then be treated as an in-state resident. According to respondents, each of the 50 states could force an out-of-state company to incorporate within its state in order to do business. Yet the entire point of the anti-discrimination requirement is that states may *not* force entities to become in-state residents in order to enjoy the same benefits available to in-state residents.

Granholm makes this clear. In discussing the New York statute's provision allowing out-of-state wineries to sell in-state provided they established a New York presence (an opportunity available to all out-of-state companies) the Court rejected the argument that this mitigated the discrimination. The Court explained:

> New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.*

v. Reily, 373 U.S. 64, 72 (1963). See also *Ward v. Maryland*, 12 Wall. 418 (1871).

Granholm, 544 U.S. at 475.

3. Respondent MBWWA also spends much space emphasizing that any out-of-state entity is allowed under the statute to acquire an in-state entity with wine wholesaler licenses. MBWWA BIO 16-17. Indeed, petitioners have been forced by § 436.1205's restriction on competition to do just that, and have acquired L & L Wine & Liquor Corporation. See App. to MBWWA BIO 15-20. They have done this specifically to be able to sell some pre-1996 wine brands. Yet, even with this acquisition, many other brands remain off limits to petitioners.

Far from mitigating the effects of Michigan's discriminatory system, however, this transaction highlights the ways in which petitioners have been injured. Instead of simply having the right to act as both an ADA and a "dualing" wine wholesaler – a right petitioners' key in-state competitors enjoy because of their pre-1996 in-state residency – petitioners *had to spend $18 million* to acquire an in-state company in order to secure these rights and level the playing field to some small extent. *Id.* at 19. This is hardly non-discriminatory. Moreover, if Michigan is allowed to force out-of-state entities to pay millions to in-state residents to acquire rights that in-state residents could have acquired for free, then the 49 other states can do this as well. See *Granholm*, 544 U.S. at 475 ("For most wineries, the expense of establishing a bricks-and-mortar distribution operation in one

State, let alone at 50, is prohibitive."). It is difficult to understand how respondent can point to this acquisition (or the general right to make such acquisitions) as evidence that the statute does not discriminate against out-of-state entities. See *Granholm*, 544 U.S. at 475 (holding that extra costs that New York's in-state presence requirement imposed on out-of-state companies were part of the unconstitutional discrimination against out-of-state wineries).

4. In *Granholm*, this Court held that the prohibition on discrimination against out-of-state commerce applies in full force to liquor regulation – that the Twenty-First Amendment does not immunize such discrimination from normal Commerce Clause scrutiny. Nonetheless, respondents cling to one sentence in *Granholm*, which they claim endorses Michigan's requirement that only in-state residents may hold liquor licenses. See State's BIO 12; MBWWA BIO 19. Responding to the argument that allowing out-of-state liquor shipments threatens the traditional three-tier system of liquor regulation, the Court in *Granholm* stated

> We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S., at 432. See also *id.*, at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require *that all liquor sold for use in the State be purchased from a licensed in-state wholesaler*").

Granholm, 544 U.S. at 489 (emphasis added).

The sentence in question clearly supports a state's right to require that liquor wholesalers be licensed by the state. Indeed, *Granholm* has a number of passages recognizing that out-of-state entities are not immune from even-handed licensing or permitting requirements. See *Granholm*, 544 U.S. at 491 ("licensing and self-reporting requirements" may be imposed on out-of state shippers); *ibid.* (New York could protect its legitimate interests by "requiring a permit" as it does for in-state shippers); *id.* at 492 (states may impose an "evenhanded licensing requirement"). None of this, however, in any way endorses a state's ability to restrict those licenses to in-state residents, as asserted by respondents.[1] States may certainly utilize a three-tier structure to regulate liquor sales. *Granholm* makes clear, though, that states may not hide behind the label of "structure" to create a scheme that discriminates against out-of-state commerce. Yet,

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[1] The quotation in *Granholm* upon which respondents focus is from Justice Scalia's concurring opinion in *North Dakota v. United States*, 495 U.S. 423, 432 (1990). That case had nothing to do with claimed discrimination against out-of-state residents. Rather, it involved a claim by the United States that North Dakota was unduly burdening the federal government in its regulation of shippers who avoided North Dakota's taxing and licensing structures by shipping directly to Air Force bases operated by the United States Department of Defense. North Dakota did not bar such shipments, but did require that such shippers affix labels indicating that the product was to be consumed only on the federal enclave. The Court upheld this regulation. The language quoted by respondents indicates only that a state may require a liquor distributor to have an in-state license – not that it has to be an in-state resident.

respondents insist on using the mantra "structure" as dispositive to a claim of discrimination. See State's BIO 10 (this "case involves only the structure of Michigan's in-state spirits and wine distribution systems); MBWWA BIO 13-14 (defending Michigan's treatment of out-of-state residents as part of its distribution "structure").

5. Respondents also seek to avoid the impact of *Granholm* by asserting that Michigan's explicit discrimination against out-of-state residents does not implicate the Commerce Clause at all. Respondents base this claim on a sentence in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in which the Court stated that the Commerce Clause "protects the interstate market, not particular interstate firms from prohibitive or burdensome regulations." *Id.* at 127-128. See MBWWA BIO 15.

This passage from *Exxon* – in which the Court measured the incidental impact of regulations that allowed many out-of-state companies to do business in-state – was not and has never been used to justify explicit discrimination against out-of-state entities.[2]

[2] The Michigan Court of Appeals never suggested that a facially discriminatory statute is immune from Commerce Clause scrutiny if it simply discriminates against out-of-state service-providers, as opposed to out-of-state product. Rather, the court first asked whether the statute was discriminatory and only after concluding it was not (a pre-*Granholm* conclusion that is the subject of our petition), did the Michigan court cite *Exxon* for the proposition that any incidental effect on out-of-state interests was of no constitutional moment. See Pet. App. 12.

See *Exxon*, 437 U.S. at 125 (first inquiring whether Maryland's statute discriminated against interstate goods, local producers or refiners). See generally *Piazza's Seafood World v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (*Exxon* involved a statute that did not facially discriminate); *National Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (*Exxon* does not deal with claims of discriminatory disparate treatment), cert. denied, 515 U.S. 1143 (1995). Rather, this Court has made clear that states violate the Commerce Clause when they discriminate against out-of-state service-providers. See *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) ("the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it. With respect to this stream of commerce, the flow control ordinance discriminates * * * ."). This case – like *Granholm* – deals with a statute that explicitly creates a separate set of rules for in-state versus out-of-state residents. As in *Granholm*, it implicates core Commerce Clause concerns.

6. Finally, respondents seek to take refuge in this Court's line of Equal Protection cases holding that grandfather clauses are allowed to recognize legitimate reliance interests under a pre-existing regulatory system. See MBWWA BIO 17-18; State's BIO 15-16. Petitioners take no issue with this rule, but it completely ignores the point that any possible reliance interests

here[3] are themselves the product of *unconstitutional discrimination* against out-of-state residents.

Respondents' argument is akin to the argument that the State of Oklahoma made in defense of a statute passed in 1910 requiring every voter to pass a literacy test, but also creating a "grandfather clause" exempting voters from this requirement if they were eligible to vote as of 1866, or were the descendants of someone eligible to vote as of 1866. See *Guinn v. United States*, 238 U.S. 347 (1915). The Court struck down this statute because it froze in place a voting-rights system that was itself unconstitutional. If this Court, or the Michigan courts upon remand, conclude that the residency requirement unconstitutionally discriminates against out-of-state residents, no "grandfather clause" doctrine can sanitize the injuries that continue to be inflicted on petitioners as a result of that unconstitutional requirement.

* * *

Petitioners here seek no more and no less than the privileges Michigan affords in-state residents (who were in-state residents as of 1996). All of the claims about the problems posed by a single entity acting as both an ADA and a wine wholesaler apply equally to in-state and out-of-state residents. Michigan

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[3] It should be noted that no in-state resident had a pre-1996 reliance interest in being able to act as both an ADA and a wine-wholesaler. There was no such thing as an ADA prior to 1996, so no in-state resident ever could have relied on acting in these dual roles.

has every right to impose an *even-handed prohibition* on any company serving in both capacities. Michigan also may choose to *allow any company* to serve both roles. Michigan cannot, however, pass one set of rules for in-state residents and another for out-of-state residents. That is the resounding message of *Granholm*, a message that the Michigan Court of Appeals should be afforded an opportunity to consider.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, the petition should be granted, the decision of the Michigan Court of Appeals should be vacated, and the case should be remanded to the Michigan Court of Appeals for reconsideration in light of *Granholm*. In the alternative, the Court should grant the petition for certiorari to resolve the important issues this case presents.

Respectfully submitted,

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